

(2186)

**APPELLATE TRIBUNAL INLAND REVENUE OF  
PAKISTAN, KARACHI BENCH, KARACHI**

Present: **MR. M. AMINULLAH SIDDIQUI, J.M.**  
**MR. MANZOOR ALI JOKHIO, A.M**

**ITA No. 1305/KB/2023**  
(Tax Year-2022)  
U/s. 4C

**M/s. Sunehri Industries (Pvt) Ltd., Karachi**  
NTN: 0676499

...Appellant

**Versus**

The CIR Zone-I, CTO, Karachi

...Respondent

Appellant by: Mr. Taimoor Ahmed Qureshi, Advocate.  
Respondent by: Mr. Asif Jamali, D.R.

Date of hearing : 01-06-2023

Date of order : 13-06-2023

**ORDER**



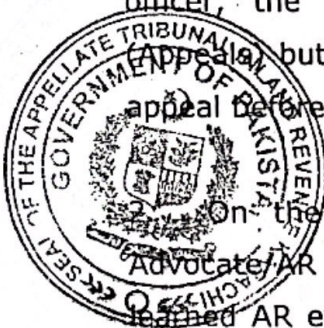
**MOHAMMAD AMINULLAH SIDDIQUI, J.M:** The titled appeal is against the Order in Appeal dated 22.05.2023 passed by the Commissioner IR (Appeals - VII), Karachi who confirmed the order dated 28.02.2023 passed under section 4C of the Ordinance, 2001 by the Assistant/Deputy Commissioner IR, Audit - II, Unit - 02, Range - A, CTO - II, Karachi for Tax Year 2022. The appellant/taxpayer has assailed both aforementioned orders on the following grounds:

- 1- *That the order in appeal passed by the learned CIR- Appeals-VII, Karachi dated 22-05-2023 wherein he confirmed the Order-in -Original passed by the DCIR, Unit-02, Audit zone -II, CTO, Karachi is bad in law and against the facts of the case, hence the same is liable to be vacated.*
- 2- *That the O-n-O was without jurisdiction that was passed by an authority who was not vested with the powers to do so. Thus the CIR-A erred in law by confirming a void order which warrants disapproval of this august forum.*

- 3- That the learned CIR-A erred in law by confirming the action of the DCIR whereby he (DCIR) treated the capital gain as income for the purpose of section 4C despite the fact that the capital gain of Rs. 260,381,924/- was not an amount CHARGEABLE under the Income Tax Ordinance 2001. Ref. Section 2(29) *ibid*.
- 4- That the learned CIR-A erred in law and facts by holding that the proper opportunity of hearing was provided by the officer to the appellant.
- 5- That the learned CIR- A fell into error by not following the case law cited at bar despite the fact that the same was binding upon him. Thus his order lacks propriety and legality which made the same unsustainable in law.
- 6- The appellant further prays to add, amend, alter or delete any grounds of appeal at the time of hearing.

2. Succinctly, facts of the case are that the appellant is a private limited company and filed return of Total Income on 26.12.2022 declaring business loss of Rs. (10,232,117) and on the same date the declared business loss was accepted in the shape of a deemed assessment order in contemplation of section 120(1)(b). Thereafter, the Assessing Officer issued notice under section 4C of the Ordinance on 17.02.2023 requiring compliance on 24.02.2023 wherein it was confronted that the appellant did not pay Super Tax under section 4C on the capital gain of Rs.260,381,924. After this single opportunity, order in original was passed on 28.02.2023 for recovery of super tax of Rs. 7,811,458/-. Being aggrieved with the action of the assessing officer, the appellant filed appeal before Commissioner IR (Appeals) but remained unsuccessful. Hence, the instant second appeal before this Tribunal on the aforementioned grounds.

On the date of hearing, Mr. Taimoor Ahmad Qureshi, Advocate AR appeared for the appellant. At the outset, the learned AR explained the undisputed fact i.e., due to holding of immovable property for a period of more than four years no such gain/income was accrued thereon which could be charged under



the head of "capital gain" He reproduced the evidence that the immovable property in question was purchased in Tax Year 2013 and disposed of in Tax Year 2022. The AR also produced the print out of return of total income as well as of the deemed assessment order under section 120 to prove that a business loss, due to administrative expenses, was shown and accepted by the Department. The AR explained that in Code 64220060 titled "Capital gain on immovable property u/s 37(3A) where holding period exceeds 4 years", the figure of Rs.260,381,924 was declared with no income tax liability thereon. Whereas, as per the applicable law and formula given under section 37(3A) of the Ordinance, the GAIN was to be computed at zero (0) and hence not chargeable to tax because the holding period of subject property was more than four (4) years. The AR pleaded that under the charging provision of section 4C (1) the super tax is chargeable on "the income" which is to be computed under section 4C (2). He contended that due to the holding period of more than 04 years only, the capital gain is to be computed at zero as per Table contained in section 37(3A), therefore super tax under section 4C of the Ordinance cannot be charged at zero income from capital gain.

3. He further submitted that the Order under section 4C was passed after just one opportunity which was a clear violation of principles of natural justice and due process.



On the other hand, Mr. Asif Jamali, learned DR appeared for the Department. He candidly conceded that the subject property was exempt from income tax u/s 37(3A) of the Ordinance because holding period was more than four (4) years. However, he contended that the amount of capital gain declared, irrespective of exemption due to holding period or computation at zero under section 37(3A), was income for the purpose of section 4C of the Ordinance and super tax was chargeable thereon.

5. We have heard learned counsels for both the sides and perused the case record with their assistance. Our findings are that all the arguments of the learned AR are convincing. Our reasoning thereof is as follows:

6. Section 4C was inserted in the Income Tax Ordinance, 2001 through Finance Act, 2022. For the sake of convenience and as a ready reference, Section 4C and Division IIB of Part I of the First schedule to the Ordinance are reproduced hereunder:

**"4C. Super tax on high earning persons.** — (1) A super tax shall be imposed for tax year 2022 and onwards at the rates specified in Division IIB of Part I of the First Schedule, on **income** of every person:

Provided that this section shall not apply to a banking company for tax year 2022.

(2) For the purposes of this section, "income" shall be the **sum of the following**: —

- (i) profit on debt, dividend, capital gains, brokerage and commission;
- (ii) **taxable** income (other than brought forward depreciation and brought forward business losses) under section 9 of the Ordinance, excluding amounts specified in clause (i);
- (iii) imputable income as defined in clause (28A) of section 2 excluding amounts specified in clause (i); and
- (iv) income computed, other than brought forward depreciation, brought forward amortization and brought forward business losses under Fourth, Fifth and Seventh Schedules.



The tax payable under sub-section (1) shall be paid, collected and deposited on the date and in the manner as specified in sub-section (1) of section 137 and all provisions of Chapter X of the Ordinance shall apply.

Where the tax is not paid by a person liable to pay it, the **Commissioner shall** by an order in writing, determine the tax payable, and shall serve upon the person, a notice of demand specifying the tax payable and within the time specified under section 137 of the Ordinance.

(5) Where the tax is not paid by a person liable to pay it, the **Commissioner shall** recover the tax payable under sub-section (1) and the provisions of Part IV, X, XI and XII of Chapter X and Part I of Chapter XI of the Ordinance shall, so far as may be, apply to the collection of tax as these apply to the collection of tax under the Ordinance.

(6) The Board may, by notification in the official Gazette, make rules for carrying out the purposes of this section.]

**[Division IIB]**

**Super Tax on high earning persons**

The rate of tax under section 4C shall be-

S.No	Income under section 4C	Rate of Tax
(1)	(2)	(3)
1.	Where income does not exceed Rs.150 million	0% of the income
2.	Where income exceeds Rs. 150 million but does not exceed Rs. 200 million	1% of the income
3.	Where income exceeds Rs. 200 million but does not exceed Rs. 250 million	2% of the income
4.	Where income exceeds Rs. 250 million but does not exceed Rs. 300 million	3% of the income
5.	Where income exceeds Rs. 300 million	4% of the income:

Provided that for tax year 2022 for persons engaged, whether partly or wholly, in the business of airlines, automobiles, beverages, cement, chemicals, cigarette and tobacco, fertilizer, iron and steel, LNG terminal, oil marketing, oil refining, petroleum and gas exploration and production, pharmaceuticals, sugar and textiles the rate of tax shall be 10% where the income exceeds Rs. 300 million:

Provided further that in case of banking companies for tax year 2023, the rate of tax shall be 10% where the income exceeds Rs. 300 million."



Sub Section (1) of Section 4C ibid says that a super tax shall be imposed for tax year 2022 and onwards at the rates specified in Division IIB of Part I of the First Schedule on the "income" of every person. Sub - Section (2) says that for the purpose of this section, income shall be the sum of clauses (i) to

(iv). The levy of super tax is applicable only where the income exceeds 150 million.

8. The moot point in the instant case is **whether computation of capital gains is for the purpose of income tax only or the same is for the purpose of levy of super tax under section 4C of the Ordinance too?**

9. Capital gains on capital assets are charged and calculated under section 37 of the Ordinance. Section 37 and Division VIII as these stood for Tax Year 2022 are reproduced as follows:

**PART V  
HEAD OF INCOME: CAPITAL GAINS**

**37. Capital gains.** - (1) Subject to this Ordinance, a gain arising on the disposal of a capital asset by a person in a tax year, other than a gain that is **exempt from tax under this Ordinance**, shall be chargeable to tax in that year under the head "Capital Gains".

(1A) Notwithstanding anything contained in sub-sections (1) and (3), gain under sub-sections (3A) by a person in a tax year, shall be chargeable to tax in that year under the head Capital Gains at the rates specified in Division VIII of Part I of the First Schedule.

(2) Subject to sub-sections (3) and (4), the gain arising on the disposal of a capital asset by a person shall be computed in accordance with the following formula, namely:-

**A - B**

where -

**A** is the consideration received by the person on disposal of the asset; and

**B** is the cost of the asset.



where a capital asset has been held by a person for more than one year [other than shares of public companies including the vouchers of Pakistan Telecommunication Corporation modaraba certificates or any instrument of transferable capital as defined in the Companies Act, 2017 (XIX of 2017)], the amount of any gain arising on disposal of the asset shall be computed in accordance with the following formula, namely: ---

$$A \times \frac{3}{4}$$

where A is the amount of the gain determined under sub-section (2).

[(3A) Notwithstanding anything contained in sub-section (3), the amount of any gain arising on disposal of an immovable property **shall be computed** in accordance with the formula specified in the Table below, namely: ---

**TABLE**

S.No.	Holding period	Gain
(1)	(2)	(3)
1.	Where the holding period of an Immoveable property does not exceed one year	A
2.	Where the holding period of an immoveable property exceeds one year but does not exceed two years	$A \times \frac{3}{4}$
3.	Where the holding period of an Immoveable property exceeds two years but does not exceed three years	$A \times \frac{1}{2}$
4.	Where the holding period of an immoveable property exceeds three years but does not exceed four years	$A \times \frac{1}{4}$
5.	Where the holding period of an immoveable property exceeds four years	0

where A is the amount of gain determined under sub-section (2).]

### Division VIII

Tax on capital gains on disposal of Immovable Property  
The rate of tax to be paid under sub-section (1A) of section 37 shall be as follows: ---

**TABLE**

S.No.	Amount of Gain	Rate of Tax
(1)	(2)	(3)
1.	Where the gain does not exceed Rs. 5 million	3.5%
2.	Where the gain exceeds Rs. 5 million but does not exceed Rs. 10 million	7.5%
3.	Where the gain exceeds Rs. 10 million but does not exceed Rs. 15 million	10%
4.	Where the gain exceeds Rs. 15 million	15%]



10. Sub Section (3A) very clearly say at serial No. 5, that where the holding period of an immovable property exceeds four years then the **GAIN** on its disposal will be **ZERO (0)**. Furthermore, no capital gains tax is chargeable as per Division VIII, Part – I of the First Schedule to the Ordinance on zero gains. The Department gave an unscrupulous twist to the law of capital gain by saying that tax rate for immovable property held for a period of more than four years is zero, which is not correct because it is the gain which is zero whereas zero rate of tax is not mentioned in Division VIII. Therefore, we conclude that quantum of gain computed under the Table of section 37(3A) for the purpose of income tax will also be taken into consideration the for levy of super tax u/s 4C of the Ordinance. However, only such gain will be charged under 4C, quantum thereof is above the ZERO. This also finds support from the definition of "tax" under section 2(63) which means any tax imposed under Chapter II hence super tax levied under section 4C falling in Chapter II is a tax defined in section 2(63). Therefore, two different computations of same income are not possible for the levy of income tax and super tax unless specifically provided like section 4C(2)(ii).

11. Although we have no ambiguity in our minds as to the zero capital gain due to holding period of more than 04 years under section 37(3A) for purpose of levy of super tax, yet we may refer to the various judgments of higher judicial fora wherein it was categorically held that where two interpretations are equally possible, then the interpretation favoring the taxpayer has to be adopted. Reliance in this regard may be placed on **M/s Pakistan Television Corporation Limited vs. Commissioner Inland Revenue (Legal) LTU, Islamabad and others [2019 SCMR**



view of the above discussions, we are of the considered that according to the law for tax year 2022, the capital gain in the instant case was not only exempt under the Ordinance, as envisaged under section 37(1), but also was zero



(0) for computation purposes (Ref: Table provided under sub section 3A of section 37 reproduced supra) hence, the same will only be taken at ZERO for charging of super tax under section 4C of the Ordinance. We have also perused the Income Tax Return for Tax Year 2022 and observed that a loss of Rs. 10,232,117/- has been declared by the appellant. Since the sum of categories/head of income enumerated under Sub - Section (2) of Section 4C of the Ordinance was below the minimum threshold for levy of super tax in the instant case, we have no hesitation to hold that the levy of super tax was illegal and unlawful which is hereby deleted.

13. Furthermore, we have also observed from the case record that only one hearing opportunity was given to the appellant by the A/DCIR before passing the order. It is a cardinal principle of law that an order affecting the rights of a party cannot be passed without providing an opportunity of hearing to the affected party. The Honorable Supreme Court of Pakistan in the case of **Commissioner Income Tax vs. Fazlur Rahman Sayeedur Rahman** reported in **PLD 1964 SC 410** while dismissing the civil appeals filed by the FBR department held as follows:

*"At the same time it should be pointed out that the right to be heard is not confined to proceedings which are judicial in form. As has been held by this Court in The Chief Commissioner, Karachi v. Mrs. Dina Sohrab Katrak {(1959) P.L.D 45 (S.G.)} the maxim "no man shall be condemned unheard" is not confined to Courts but extends to all proceedings, by whomsoever held which may affect the person or property or other right of the parties concerned in the dispute, and the maxim will apply with no less force to proceeding which affect liability to pay a tax.*



*We hold that an opportunity of hearing was essential and in its absence the order of the Commissioner of Income-tax is void. These two appeals are dismissed but there is no order as to costs."*

14. For the foregoing reasons and by respectfully following the binding case laws cited above, we hold that the orders passed by

both the authorities below as illegal and unlawful which are hereby ~~annulled~~ on law points as well as on merits.

15. The appeal filed by the appellant is **allowed**.



-----Sd/-----  
**(MANZOOR ALI JOKHIO)**  
ACCOUNTANT MEMBER

-----Sd/-----  
**(M. AMINULLAH SIDDIQUI)**  
JUDICIAL MEMBER

Favaz/APS\*

Copy of the Tribunal's order forwarded to:  
1. The Appellant M/S. Sunnelli Industries (Pvt) Ltd.  
2. C/o: Facemov. M. A. Bhatti  
3. The C.I.T. ....  
4. The C.I.T (A) or A.A.C. ....  
Asstt. Registrar A.M.T. Karachi.

Samir  
Registrar 17/06/23  
Appellate Tribunal Inland Revenue  
Karachi.

ASSEESSES

Copy of the Order served on the Assesses/A.A.  
M/S. Sunnelli Industries  
Mr. Waheed Ahmed  
on 17-06-23 at 3.45 P.m  
by the undersigned

Naqeeb 17/06/23  
PROCESSE SERVER  
(Name/Signature and Date)  
Appellate Tribunal Inland Revenue  
Karachi.